

DEC 27 1983

ALEXANDER L. STEWART  
CLERK

**No. 82-1724**

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In The  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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STATE OF NEW YORK,

*Petitioner,*

vs.

ROBERT UPLINGER and SUSAN BUTLER,

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE  
NEW YORK STATE COURT OF APPEALS**

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**PETITIONER'S OBJECTION TO MOTION OF  
LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC. TO FILE BRIEF AMICUS CURIAE**

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Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the Lambda Legal Defense and Education Fund, Inc. for leave to file a brief *amicus curiae* on behalf of respondent Uplinger. The motion and brief *amicus curiae* were received by petitioner on December 21, 1983. Consent to file a brief as *amicus curiae* had been requested of petitioner but refused on the ground that *amicus* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amicus curiae* because the Lambda Legal Defense and Education Fund, Inc. has no legitimate interest in the instant case as demonstrated by the content of its proposed brief *amicus curiae*. Two-thirds of the

brief concentrates on homosexuality *per se*, and the contention of *amicus* that private, non-commercial consensual sodomy is protected by the fundamental constitutional right of privacy. Thus, to this extent, the proffered *amicus curiae* brief ignores totally the legal issue before the Court, to wit, the constitutionality of New York Penal Law §240.35(3). The only matter for review is the New York statute that criminalizes certain conduct, wholly unrelated to the sexual preference of the solicitor. Those portions of the instant *amicus curiae* brief which concentrate on homosexuality in contemporary American life will not assist the Court in any way and therefore should not become a part of the materials to be considered in this case.

With respect to the discussion of the claimed under-inclusiveness of New York Penal Law §240.35(3), this issue and all of the other relevant claimed constitutional infirmities of the statute have already been very well briefed, with examples and authorities, by respondent Uplinger. Thus, the brief of *amicus* will not assist the Court in any way in that it presents no relevant arguments or materials on the singular question to be decided, to wit, the constitutionality of the statute.

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the Lambda Legal Defense and Education Fund, Inc. for leave to file a brief *amicus curiae*.

Respectfully submitted,

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